

March 3, 1998

The "Public *Adarand*" and the "Private *Adarand*"

Senator McConnell is expected to introduce an amendment to the highway bill that will prohibit race-based preferences in federal highway contracts. That amendment will build on the law that was announced by the Supreme Court in the Adarand case:

Adarand Constructors, Inc. was organized in 1976. It is a small, family-run business that specializes in the installation of highway guardrails. In 1989, Adarand's bid on a federal highway project was rejected because its owner and operator, Randy Pech, is a white male. **Although Adarand was the qualified low bidder, the contract was given to firm that had been government-certified as being controlled by a "socially and economically disadvantaged individual."** The Federal law *presumes* that *every* member of some racial minority groups and *all* women are socially and economically disadvantaged.

The "Public *Adarand*"

Adarand sued the United States Department of Transportation, challenging especially the race-based presumptions of the law. Adarand lost at the district court, and it lost again at the court of appeals. But in June of 1995, the United States Supreme Court, by the narrowest of margins, issued a decision that favored Adarand. **The Court held that racial classifications, even if authorized by Congress, "must serve a compelling governmental interest" and "be narrowly tailored to further that interest."** *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). This standard is the highest hurdle in equal protection:

"[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate. . . . [R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. . . ." 515 U.S. at 236 (citation & internal quotation marks omitted).

The Supreme Court did not find for Adarand directly; it set the high constitutional standard and then remanded the case to the district court for a determination of whether the Federal highway law met that high standard. **In June 1997, the district court held the law unconstitutional because it was not narrowly tailored to a compelling governmental interest.** *Adarand Constructors v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997). The court said that it found it difficult to envision a race-based classification that could be narrowly tailored because "by its very nature" such a program is both overinclusive and underinclusive:

"The statutes and regulations governing the SCC [the race-conscious subcontracting compensation clause] program are *overinclusive* in that they presume that all those in the named minority groups are economically and, in some acts and regulations, socially disadvantaged. This presumption is flawed, as is its corollary, namely that the majority (Caucasians) as well as members of other (unlisted) minority groups are not socially and/or economically disadvantaged. By excluding certain minority groups whose members *are* economically and socially disadvantaged due to past and present discrimination, the SCC program is *underinclusive*." 965 F. Supp. at 1580 (emphasis added).

The United States Government has appealed the decision of the district court, but the court of appeals is not expected to render a decision before late next year.

The "Private Adarand"

Randy Pech and his wife, Valery Pech (who is a co-owner of Adarand Constructors, Inc.), have both testified before Congress. Their testimony reveals how government-sponsored discrimination affects one real (not abstract) American family. Here is an excerpt from Mr. Pech's testimony to the House Judiciary Committee on June 26, 1997:

"Adarand has been injured and I, personally, have been denied my civil rights because of [congressionally enacted] race-based government programs. Adarand loses approximately eight to 12 jobs per year solely because I am a white male.

"Is the fact that I am a white male a justifiable reason not to award Adarand a contract? Is it morally correct to deny the other employees of Adarand a paycheck just because of *my race and gender*? Is the fact that one of my competitors happens to be a white female [and another] a Hispanic male a justifiable reason to award their companies the contract and to give their employees a paycheck? I don't think so, but yet it happens to this day.

"Just last Thursday, . . . I received a fax from Elam Construction Company. The fax referenced a job we had recently bid [on]. It showed all of our bid items and our prices along with the prices of the company they used. Our total bid was approximately \$137,000, but they used the bid submitted by Ideal Fencing for \$139,000. A handwritten note below the prices said they used Ideal's price to meet the project's Disadvantaged Business Enterprise (DBE) goals. I called Elam Construction and asked if they even tried to submit their bid with our numbers? They said 'no,' the prices were too close to justify a fight they would ultimately lose.

"So this week, Ideal Fencing, a company that has been in business for at least 10 years and has revenues that match or exceed Adarand's, is awarded a job solely because Ideal is owned and operated by a white female. Do you suppose for one second that her white male husband is not going to reap the benefits and that my white female wife won't suffer the loss due to this unjustifiable, unconstitutional, and immoral decision based on someone's gender?"

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